

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joseph Whiting,

Petitioner,

v.

United States of America,

Respondent.

Case No. 06-20465

Honorable Nancy G. Edmunds

**ORDER GRANTING PETITIONER'S MOTION TO AMEND
AND ORDERING GOVERNMENT TO RESPOND [2706]**

This matter comes before the Court on Petitioner's motion to amend his § 2255 petition. Motions to amend § 2255 motions are governed by the Federal Rules of Civil Procedure. *Clark v. United States*, 764 F.3d 653, 661 (6th Cir. 2014). (Petitioner's motion is not a second or successive petition because it was filed "before the adjudication of the initial § 2255 motion [was] complete." *Id.* at 658.)

Petitioner filed his motion to amend ten months after his first filed his original motion and six months after the Government's response. Accordingly, he is not entitled to an amendment "as a matter of course" and must seek the leave of Court. Fed. R. Civ. P. 15(a). "The court should freely give leave to amend when justice so requires." Fed. R. Civ. P. 15(a)(1)(2). "Denial may be appropriate, however, where there is 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.'" *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The

Court has determined that these circumstances do not apply and GRANTS Petitioner's motion to amend.

According to Local Rule 15.1, Petitioner should have attached his proposed amended § 2255 motion as an exhibit to his motion to amend. Instead, Petitioner filed his amended § 2255 motion as a separate document. (Dkt. 2707.) This is not a basis for denial. The Court deems Petitioner's amended § 2255 motion to have been filed the date that this order issues. Furthermore, to the extent necessary, the Court finds that Petitioner's amended § 2255 motion relates back to the date his original § 2255 motion was filed under Federal Rule of Civil Procedure 15(c)(1)(B).

Petitioner's amended § 2255 motion adds a new claim that his appellate counsel was ineffective for failing to raise a claim on appeal that Petitioner's sentence on Count 13 of the indictment violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Government is ordered to respond to this new claim on or before **August 24, 2015**. Petitioner shall file a reply on or before **September 7, 2015**.

SO ORDERED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: August 10, 2015

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 10, 2015, by electronic and/or ordinary mail.

s/Carol J. Bethel
Case Manager